

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

ISO New England, Inc. and New England
Power Pool

)
)
)
)

Docket No. ER09-1051-000

**COMMENTS AND PROTEST OF NEPOOL INDUSTRIAL CUSTOMER COALITION;
ENERNOC, INC.; ENERGYCONNECT, INC.; CPOWER, INC.;
VIRIDITY ENERGY, INC.; AND COMVERGE, INC.**

Pursuant to Rule 211¹ of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure, the NEPOOL Industrial Customer Coalition; Comverge Inc., CPower, Inc., EnergyConnect, Inc., EnerNOC, Inc.; and Viridity Energy, Inc. (collectively, "Demand Response Supporters"), hereby file these Comments and Protest in the above-referenced proceeding.

I. INTRODUCTION

On April 28, 2009, the Independent System Operator of New England, Inc.(hereinafter referred to as "ISO-NE") and New England Power Pool Participants Committee submitted a compliance filing ("compliance filing" or "filing") in response to the Commission's Final Rule On Wholesale Competition in Regions With Organized Power Markets issued on October 17, 2008.² The filing reflects ISO-NE's attempt to comply with directives in Order 719 regarding: (1) the role of demand response resources in ISO-NE's markets, including the use of scarcity pricing; (2) long-term power contracting; (3) market monitoring policies; and (4) RTO responsiveness to customers and other stakeholders.

¹ 18 C.F.R. §385.211.

² *Wholesale Competition in Regions With Organized Power Markets*, 125 FERC ¶61,071 (2008) ("Order 719").

The following comments and protest of Demand Response Supporters are limited to those portions of ISO-NE's filing related to demand response issues.³ In general, Demand Response Supporters continue to be supportive of the initial progress and efforts ISO-NE has made toward addressing demand response resource issues in ISO-NE. Nevertheless, while the expansion of the participation of a subset of these resources has occurred, the ISO-NE Tariff and its Market Rules are still restrictive, and barriers continue to stifle the demand response participation contemplated by the Commission in Order 719.⁴ Too many barriers to demand response persist and too much work remains to allow ISO-NE's claim of compliance to go unanswered. ISO-NE's narrow and minimalist approach to purported compliance undermines the hard work that went into the development of Order 719, and is counter-productive to both the direction and initial efforts ISO-NE has made to date. ISO-NE's positioning on demand response compliance to Order 719 is a step backwards relative to the intention of the Order because the mechanism that ISO-NE cites as evidence is an insurmountable barrier to participation of demand response in the ISO-NE ancillary services market.

In several important respects, ISO-NE must make further progress to comply with the requirements of Order 719. Demand Response Supporters respectfully request that the Commission address these concerns and require ISO-NE to develop, in consultation with stakeholders, changes to both the Tariff and Market Rules to enable greater demand response participation by requiring comparable treatment of demand response resources and eliminating the numerous barriers to demand response participation that exist in New England, as identified below.

³NICC is separately submitting a filing that addresses non-demand response aspects of ISO-NE's compliance filing. Other Demand Response Supporters may also file separate pleadings.

⁴ See, e.g. Order 719 at P16.

Demand Response Supporters also request that the Commission require ISO-NE to engage the stakeholder process to develop and implement these initiatives, and report by a date set by the Commission in order to demonstrate progress on these issues.

II. COMMENTS

As noted above, Order 719 requires RTOs to make reforms to improve the operation of organized wholesale electric markets in the area of demand response. Furthermore, as ISO-NE points out in its filing, with respect to demand response, Order 719 requires RTOs to:

- (1) *Accept bids from demand response resources in RTOs' and ISOs' markets for certain ancillary services on a basis comparable to other resources*; (2) eliminate, during a system emergency, a charge to a buyer that takes less electric energy in the real-time market than it purchased in the day-ahead market; (3) in certain circumstances, permit an aggregator of retail customers (“ARC”) to bid demand response on behalf of retail customers directly into the organized electric market; (4) modify their market rules, as necessary, to allow the market-clearing price, during periods of operating reserve shortage, to reach a level that rebalances supply and demand so as to maintain reliability while providing sufficient provisions for mitigating market power; and (5) study whether further reforms are necessary to eliminate barriers to demand response in organized markets.⁵

To that end, ISO-NE reports that, between December 2008 and March 2009, the NEPOOL Markets Committee held six meetings to consider requirements of the Final Rule with respect to demand response.⁶ As a result of these meetings, the Markets Committee ultimately voted to approve several revisions to Market Rule 1 regarding the current bidding rules governing Dispatchable Asset Related Demand (“DARD”) in the reserve markets.⁷

⁵ *Id.* at P 3 (emphasis added).

⁶ Transmittal Letter at 7.

⁷ *Id.* at 8. ISO-NE recites that, at the April 3, 2009, NEPOOL Participants Committee meeting, ISO-NE proposed changes to several parts of the Tariff and Participants Agreement, including revisions to Market Rule 1 regarding the current bidding rules governing Dispatchable Asset Related Demand in the reserve markets. This measure passed with a vote of 82.90% to 17.10%.

While these measures ultimately passed, as ISO-NE notes, the opposition to the revisions largely came from representatives of alternative resources and end-users, many of whom argued that the ISO Tariff changes were not sufficient to satisfy Order 719.⁸ In addition, although the NEPOOL Markets Committee did provide input to ISO-NE identifying additional market barriers to demand response, no formal action was taken.⁹

ISO-NE states that the New England region has been recognized as a pioneer in the development of demand response resources and their integration into the wholesale electricity market and that, since 2003, New England's demand response programs and the Forward Capacity Market has grown from 100 MW to over 2,500 MW.¹⁰ ISO-NE deserves praise for the growth of demand resource participation in forward capacity market ("FCM"), but that is where the praise should stop. Inadequate or no demand response resource access to other revenue streams available to generators (e.g., energy and ancillary services) is a continuing barrier and is evidence of the lack of comparability of treatment between demand response resources and generation.

ISO-NE uses the eligibility of a narrow asset class of resources, known as DARDs, as its support for the notion that demand response resources may participate in ancillary services markets as required by Order 719.¹¹ ISO-NE also bases its claim of Order 719 compliance in part on a small amount of demand response through an extremely limited pilot program, known as the Demand Response Reserve Pilot Program ("DRRP").

DARDs are only a narrow subset of large demand-side resources, with specific characteristics. The Market Rules' eligibility requirements for DARDs exclude all other

⁸ *Id.* at 8.

⁹ *Id.*

¹⁰ *Id.* at 13-14.

¹¹ *Id.* at 16-17.

demand resources from participation.¹² For example, the peak load of a retail customer with a DARD must be greater than or equal to 5 MW. In addition, DARDs must take pricing at a system node. And, DARDs must be capable of having their energy consumption modified in real-time in response to electronic dispatch instructions issued by ISO-NE via direct link.¹³ All other customers that may otherwise have the technical ability to provide ancillary services in the ISO-NE market are ineligible to participate.

The limited DRRP, on the other hand, was implemented in October 2006 to determine whether “smaller” demand response resources would be able to participate as resources on a basis comparable to supply resources.¹⁴ DRRP participation today is limited to the Connecticut load zone alone. The DRRP program has achieved participation of only 39.3 MW at its highest seasonal level.¹⁵ The greatest number of participants in the Pilot Program in any season was 92, in the both the summers of 2007 and 2008.¹⁶

In general, and considering the starting point from which the market began, Demand Response Supporters are encouraged that ISO-NE has allowed the participation and expanded the use of at least some types of demand response resources. ISO-NE has devoted a substantial amount of time and effort to address demand response participation, which has improved the overall market.

Although these are positive initial steps, many possibilities exist for expanding participation of demand response resources in ISO-NE and eliminating the barriers, both absolute and practical, that prevent a more robust and meaningful opportunity to participate.

¹² ISO-NE Manual 28, § 12.3.5.3.

¹³ *Id.*

¹⁴ *Id.* at 18; ISO Tariff § III.E.8.

¹⁵ *Id.* at 19

¹⁶ *Id.*

While there has been notable progress with respect to demand resource participation in ISO-NE, this progress should not be confused with compliance with the requirements of Order 719.

ISO-NE, in asserting its compliance with Order 719's demand response requirements, relies solely on the DARD program to show that demand response resources are treated comparably. Yet, due to the restrictions imposed by Market Rules and additional limits imposed by practical circumstances, the proposed changes to bidding parameters for DARDs simply fail to meet the Commission's mandate to treat demand resources comparably to other resources in ISO-NE's markets. It seems that ISO-NE has misinterpreted the nature of "comparable" treatment for demand response. For perspective, it is certain that generation resources would not be considered to be treated "comparably" if they had restrictions imposed on them in the same manner as are currently imposed on demand resources. In fact, as demonstrated more fully below, there are several market barriers created by the rules governing DARD eligibility.

Furthermore, an additional significant barrier exists to demand response resources of less than 5 MW. Even though ISO-NE commits to studying the effects of these "smaller resources" in the future,¹⁷ and currently operates a pilot program for resources of less than 5 MW, the issue nevertheless remains that having such a large minimum customer size requirement is a significant barrier that cannot be reasonably justified by ISO-NE.

Finally, ISO-NE gives no firm commitment to increasing the participation of demand resources. In several instances throughout the filing, ISO-NE lists the many identified barriers to the participation of demand resources.¹⁸ However, while it recognizes these deficiencies, it nonetheless reports that it is in compliance with Order 719. To be sure, Order 719 does not

¹⁷ Transmittal Letter at 19-20.

¹⁸ *See, e.g. Id.* at 50-53, 55.

impose any obligation on an RTO/ISO to have complete saturation of demand resources or a perfect system going forward to address demand response participation. The Order does contemplate that, when obvious deficiencies exist that unreasonably prevent demand response participation, RTOs/ISOs have an obligation to work toward reaching a solution and integrating these resources into their markets. ISO-NE, by relying on DARDs to justify its claim of compliance today, and failing to affirm or acknowledge its obligation to work toward wider participation of demand resources, does not comply with Order 719.

III. PROTEST

A. ISO-NE's Rules Allowing Participation of DARDs are Insufficient to Comply with Order 719.

Order 719 requires each RTO or ISO to accept bids from demand response resources on a basis comparable to any other resources, for ancillary services.¹⁹ The Commission attaches importance to the introduction and increased participation of demand resources as these resources provide valuable benefit to the market. Specifically, in Order 719, the Commission states:

Demand response can provide competitive pressure to reduce wholesale power prices; increases awareness of energy usage; provides for more efficient operation of markets; mitigates market power; enhances reliability; and in combination with certain new technologies, can support the use of renewable energy resources, distributed generation, and advanced metering. Thus, enabling demand-side resources, as well as supply-side resources, improves the economic operation of electric power markets by aligning prices more closely with the value customers place on electric power. A well-functioning competitive wholesale electric energy market should reflect current supply and demand conditions.²⁰

¹⁹ Order No. 719 at P 3.

²⁰ Order 719 at P 16.

Repeatedly throughout its filing, ISO-NE relies on the participation of DARDs to claim compliance with the Commission's directives. Such reliance is misplaced.

Market Rule 1 defines a DARD as:

Any portion of an Asset Related Demand of a Market Participant that meets the requirements of the ISO New England Manuals to have its energy consumption modeled in Real-Time because of its ability to respond to remote dispatch instructions from the ISO. A Dispatchable Asset Related Demand must have Electronic Dispatch Capability, must be able to increase or decrease energy consumption between its Minimum Consumption Limit and Maximum Consumption Limit in accordance with ISO dispatch instructions, and must meet the technical requirements specified in the ISO New England Manuals. Pumped Storage facilities may qualify as Dispatchable Asset Related Demand resources, however, such resources shall not qualify as a capacity resource for both generating output and dispatchable pumping demand of the facility.

Furthermore, Market Rule 1 defines Asset Related Demand as “a physical load that has been discretely modeled within the ISO's dispatch and settlement systems and that settles at a Node.”

As discussed during the numerous stakeholder meetings held between December 2008 until March 2009, stakeholders expected that integrating and expanding the participation of demand resources in ISO-NE would not be an expansion of the DARD rules, but rather a separate stakeholder initiative aimed at demand resources as a class, not simply a subset such as DARDs.²¹ Unfortunately, ISO-NE preempted this approach, and decided to rely on DARD participation alone as a basis to justify compliance with Order 719's comparability requirements. Such reliance is not only misplaced, but cynical considering that prior to this filing—and throughout the stakeholder discussions that culminated in the compliance filing—

²¹ See “*Barriers to Demand Response Participation in ISO Reserve Market as Dispatchable Asset Related Demand Resources*,” EnerNOC presentation to NEPOOL Markets Committee, February 10, 2009, p 7.

ISO-NE had not referred to a DARD as a form of demand response, nor had ISO-NE referenced DARDs as evidence of the progress made in removing barriers and creating opportunities for demand response. The reason for this omission is inherent in the above definition of a DARD, and the fact that DARDs are a special type of demand-side resource, treated entirely differently and under a separate set of rules from the demand response class of resources. As far as Demand Response Supporters are aware, only pumped hydro facilities have been able to qualify and participate as DARDs and, as of this filing, only two such facilities have registered as DARDs in ISO-NE. This reliance on DARD participation as the basis for compliance would render Order 719's requirements almost meaningless. Such reliance ignores the extremely restrictive eligibility requirements for DARDs. In practice, these requirements foreclose participation of the overwhelming number of willing and able participants.

The rules governing eligibility of resources to participate as DARDs are unduly restrictive for the following reasons.²² First, the rules include minimum demand requirements, such that resources of less than 5 MW cannot participate.²³ This erects an unjustified barrier to demand response participation of "smaller resources." Compounding this barrier, the rules do not permit aggregation of resources of less than 5 MW, thereby completely foreclosing participation of these resources.

The rules also impose unreasonably lengthy commitment periods on potential resources, requiring a 12-month commitment period if electing to take nodal pricing,

²² ISO-NE Manual 28, §12.3.5.3.

²³ *Id.*

which is the prerequisite to qualify as an Asset Related Demand.²⁴ This is an unreasonable restriction and will serve to prevent customers from signing and committing to this requirement.

Other DARD restrictions also pose significant barriers to demand response participating in the ancillary markets on a comparable basis to generation. First, DARDs cannot participate in the Forward Capacity Market (“FCM”). That is, a demand resource, even if it meets the above eligibility requirements, would be faced with making a choice whether to participate in the ancillary market as a DARD or instead participate in the FCM. They cannot participate in both. Generation resources, on the other hand, can and do participate in both ancillary and capacity markets, and for that matter, the ISO-NE energy market. Approximately 1600 MW of demand response cleared the first FCM auction and obtained a capacity supply obligation (“CSO”). None of this demand response capacity will be able to participate in the ancillary market as a DARD so long as it continues to have a CSO in any delivery period of the FCM. It is unreasonable for ISO-NE to assert compliance with Order 719 given the explicit requirement that, for participation as a DARD, the demand resource must make a single market determination.

The second significant restriction is that DARD participation in the Forward Reserve Market requires the asset to either submit Demand Bids into the Day Ahead Energy Market or have another entity submit these on its behalf. This is a hurdle to participation for customers that are not accustomed to LMP volatility. An additional hurdle is the requirement to post financial assurance if participating in the Energy Markets, which most retail customers are neither positioned nor accustomed to providing. These requirements put Curtailment Service

²⁴ ISO-NE Manual 28, § 12.3.5.3.

Providers (“CSPs”), who are typically not involved in the energy supply relationship with the customer, at a competitive disadvantage vis-à-vis the host LDCs and are not required for ancillary service market participation in other RTOs.

These facts demonstrate that DARDs are integrated into the market as a demand-side resource, and not as a supply-side resource, whereas demand resources, including demand response, is integrated into the FCM as a supply-side resource. Creating mixed market integration opportunities for the same type resources forces a single market selection determination for these resources. And, in the case of any demand-side integration approach for demand response, it forces CSPs to either become an LSE or somehow partner with each and every LSE within the ISO-NE region that serve demand response customers. Such a mixed construct will not work, and imposes insurmountable barriers to the comparable treatment of demand response in the manner intended by Order 719. Put simply, ISO-NE’s position that DARDs provide an opportunity for demand response resources by which ISO-NE claims compliance with Order 719 is misguided and will only serve to continue to prevent the participation of many otherwise-eligible resources and demonstrates that ISO-NE does not treat demand resources on a comparable basis to other resources.

B. ISO-NE Market Rules Impose Significant Barriers to Participation of Smaller Demand Resources, Without Sufficient Justification.

Considering ISO-NE’s unjustified reliance on DARDs to satisfy its Order 719 compliance obligations, significant barriers exist to potential demand response resources in that a DARD, by definition, must be 5 MW or greater. ISO-NE attempts to get around this issue in

three ways. First, ISO-NE states that, because DARDs must go through their LDCs for participation, and it cannot force LDCs to adopt certain rules, it is not able to unilaterally lower the 5 MW minimum. In essence, ISO-NE has delegated its authority to modify its rules to whatever is convenient to the LSE.

Second, ISO-NE notes that it is currently running a Pilot Program, DRRP, to allow “smaller resources” to participate as ancillary services resources in the ISO-NE market.²⁵ However, even the most superficial details of the DRRP show the extremely limited nature of potential participation. Far from a robust or widespread program, the DRRP operates only in Connecticut and, to date, its maximum seasonal MW reduction was in the summer of 2007, and equaled 38.9 MW with 92 total participants.²⁶ Clearly, this does not prove that no barrier exists to demand response resource participation.

Third, ISO-NE, addressing one of the requirements in Order 719, states that it will continue to discuss and evaluate the participation of smaller resources.²⁷ While this statement is a positive step and should not be discouraged, it in no way changes the fact that the barrier exists. In fact, it highlights the barrier and fails to establish an affirmative obligation on ISO-NE to address it.

Fourth, ISO-NE does not allow for demand response to qualify to provide spinning or non-spinning reserves, in part because of a lack of suitable measurement and verification (“M&V”) standard to allow demand response megawatts (MWs) to be used comparably.²⁸ Operating reserve requirements have been designed for generators that have dedicated

²⁵ Transmittal Letter at 31.

²⁶ *Id.* at 19.

²⁷ *Id.* at 31.

²⁸ Demand Response Supporters recognize that, technically, DARDs can provide reserves. However, as discussed above, DARDs do not have meaningful opportunities to participate.

communications to grid operators. What is needed is a spinning reserves standard based on M&V that includes requirements for end-to-end data verification, ongoing verification of MW availability, and near real-time estimation of load reduction before and after a DR event is activated. Overall, this M&V standard is needed to show availability of demand response for operating reserves, emergency use, and energy avoidance. The timing requirement is needed to show grid operators how much demand response is available if called on (e.g., to satisfy capacity availability and operating reserve performance availability requirements). The notice requirement is needed to create certainty that within a specific time period (e.g., 5 minutes after notice) the demand response will respond. This process should be placed on a fast track at ISO-NE to ensure comparability with generation, consistent with Order 719.

C. ISO-NE Should Be Directed to Engage in Further Development and Expansion of Demand Response.

ISO-NE's compliance filing also fails to meet the Commission's Order 719 requirements because, while it cannot yet demonstrate compliance, it also does not include any firm commitment to make further enhancements to increase participation of demand response resources in its markets. ISO-NE acknowledges that, as part of Order 719, the Commission requires RTOs to "assess and report on any remaining barriers to comparable treatment of demand response resources."²⁹ Accordingly, ISO-NE identifies numerous barriers to participation, some of which are referenced above, including:

- Commercial/Business barriers: the lack of payment for load reductions
- Technical and Market barriers:
 - 5 MW minimum peak load requirement
 - Lack of aggregation

²⁹ Order No. 719 at P 235.

- Local distribution company's back office infrastructure requirements
- Peak hours requirements
- Lack of uniformity across RTOs/ISOs for participation rules and regulations
- Financial and Economic barriers:
 - Requirement that retail customer remains a DARD for 12 months
 - Lack of supply-side treatment for DARDs in the forward capacity market
 - Price volatility in day-ahead and real-time markets as a barrier to retail participation
 - Costs of installing advanced metering.³⁰

Despite assessing and identifying these many barriers to comparable treatment of demand response resources, ISO-NE does not commit to reporting any ongoing analysis regarding remaining barriers to comparable treatment. Furthermore, ISO-NE does not commit to resolving the issue of increased participation of demand resources. To confirm that ISO-NE is under such a commitment, the Commission should direct ISO-NE to address and resolve these outstanding issues.

D. The May 31, 2010 Expiration of Current Demand Response Programs Constitutes a Barrier to Entry That Must be Addressed Through a Stakeholder Process for Resolution.

Presently, the Tariff provides that the current demand response programs expire on May 31, 2010.³¹ Although the Tariff language also allows for consideration of the programs for a period beyond May 31, 2010, it imposes no obligation on ISO-NE to continue them. The Tariff only requires ISO-NE to make a “determination.”³² And while assets in the Real Time Demand Response program will be able to continue participating as ICAP resources through the FCM,

³⁰ Transmittal Letter at 50-53.

³¹ Tariff Section III.E.1.3.

³² *Id.*

and price response programs are being addressed through the FERC Order regarding DALRP issued in June 2008, there is no stakeholder process devoted to the continuation of the DRRP.

As noted above, Demand Response Supporters strongly disagree with ISO-NE's assertions that its DARDs programs alone comply with Order 719's demand response requirements. However, the expiration of the demand response programs would certainly not comply with Order 719,³³ and the Commission should require ISO-NE to engage the stakeholder process in order to determine how best to continue and expand upon the existing demand response programs.

Furthermore, while ISO-NE throughout its filing makes generic references to addressing demand response issues at some future point in time, in order to make certain that these important issues are addressed by a date certain, the Commission should require ISO-NE to make compliance filings that detail its efforts and the results of the stakeholder process, as well as comprehensively describe its plan for the continuation of demand response in its market. ISO-NE should also be required to, at the very least, continue the existing demand response programs until such a time as its plan is developed and in progress. The Commission should require that, by February 1, 2010, ISO-NE must either: (1) propose the continuation of existing programs as is or (2) file modifications and continuation of existing programs.

E. Generic Comparability for Demand Response Should Be Addressed In A Generic Proceeding.

In each of the RTO-specific dockets, the filings of RTOs raise comparability issues that are many times common. Achieving common outcomes on these comparability issues will facilitate demand response participation in organized markets. Achieving common outcomes on

³³ Order 719 at P 3.

these comparability issues will also allow RTOs and stakeholders to deploy resources more efficiently. Accordingly, Demand Response Supporters respectfully request that the Commission evaluate comments and protests not only within the narrow confines of a particular RTO region, but with an eye toward identifying common comparability across several or all RTO regions. Upon identifying common issues that cross RTO boundaries, the Commission should establish a generic proceeding to address these issues efficiently.

IV. CONCLUSION

WHEREFORE, Demand Response Supporters respectfully request that the Commission:

- (1) Find that ISO-NE has not complied with Order 719's directives with regard to demand response resource participation in ancillary service markets;
- (2) Find that significant barriers exist preventing demand response resources from participating in ISO-NE;
- (3) Require that ISO-NE engage the stakeholder process and report, by a date certain, on the affirmative steps that will be taken in order to foster the increased participation of demand resources in ISO-NE;
- (4) Require ISO-NE to file, by February 1, 2010, either a proposal for the continuation of existing programs as they currently exist or modifications and continuation of existing programs; and
- (5) Establish a generic proceeding to address issues that are common across all RTOs related to comparability of demand response resources.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By: / s / Robert A. Weishaar, Jr.

Robert A. Weishaar, Jr.
Dennis P. Jamouneau
777 North Capitol Street, N.E., Suite 401
Washington, DC 20002-4292
Phone: (202) 898-5700
Fax: (717) 260-1765
E-mail: rweishaa@mwn.com
 djamouneau@mwn.com

Counsel to the NEPOOL Industrial Customer Coalition and on behalf of EnerNOC, Inc.; Energy Connect, Inc.; CPower, Inc.; Viridity Energy, Inc.; and Comverge, Inc.

Dated: May 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Comments and Protest *via* electronic transmission, hand-delivery or ordinary U.S. mail, postage prepaid, upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 26th day of May, 2009.

/ s / Robert A. Weishaar, Jr.

Robert A. Weishaar, Jr.
McNees Wallace & Nurick LLC
777 North Capitol Street, NE, Suite 401
Washington, DC 20002-4292
Phone: (202) 898-5700
Fax: (717) 260-1765
E-mail: rweishaa@mwn.com